LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

75-1483

No. ~~75-14852~~

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Petitioner,

vs.

KENNY CONSTRUCTION COMPANY, A CORPORATION, S. A. HEALY COMPANY, A CORPORATION, AND JAMES McHUGH CONSTRUCTION COMPANY, A CORPORATION, d/b/a KENNY-HEALY-McHUGH, A JOINT VENTURE, AND ROYAL INDEMNITY COMPANY, A CORPORATION,
Respondents.

ANSWER OF ROYAL INDEMNITY COMPANY TO PETITION FOR WRIT OF CERTIORARI.

HENRY J. MARQUARD,
39 South LaSalle Street,
Chicago, Illinois 60603,
312-782-5225,
Attorney for Respondent Royal Indemnity Company.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

	PAGE
Questions Presented for Review	1
Statement of the Case	3
I. The City Comity Argument Does Not Warrant Supreme Court Review	11
A. The Issue Was Not Raised by the City in Either the District Court or the Court of Appeals	11
B. The Injunctions Entered by the District Court Were Proper in That They "Protected and Effectuated" the Declaratory Judgment	13
II. The Decisions of the District Court and the Court of Appeals Were Correct as a Matter of Illinois Law	15
Conclusion	20

AUTHORITIES CITED.

Cases.

Cardinal v. Louisiana, 394 U. S. 437 (1969) 11
Collins v. Montgomery Ward & Co., 21 Ill. App. 3d 1037 (1974) 17
Davis v. Commonwealth Edison Co., 61 Ill. 2d 494 (1975) 17
Donelon v. New Orleans Terminal Company, 474 F. 2d 1108 (5th Cir. 1971) 14
Huffman v. Pursue, Ltd., 420 U. S. 592 (1975) 11
Knickerbocker Roofing v. Mendius Associates, 95 Ill. App. 2d 96 (1958) 18
Li Petri v. Turner Construction Co., 36 Ill. 2d 597 (1967) 15
McInerney v. Hasbrook Construction Co., 16 Ill. App. 3d 464 (1974) 17
Sears, Roebuck and Company v. Zurich Insurance Company, 422 F. 2d 587 (7th Cir. 1970) 12-13
Southwest Airlines Co. v. Texas International Airlines, 396 F. Supp. 678 (N. D. Tex. 1975) 14
Tatar v. Maxon Construction Co., 54 Ill. 2d 64 (1973) .. 16
Westinghouse Electric Elevator Co. v. La Salle Monroe Building Corp., 395 Ill. 429 (1947) 15
Wilson v. Illinois Bell Telephone Company, 19 Ill. App. 3d 47 (1974) 17
Woods Exploration & Producing Company v. Aluminum Company of America, 438 F. 2d 1286 (5th Cir. 1971). 14
Zadak v. Cannon, 59 Ill. 2d 118 (1974) 16

Statutes.

28 U. S. C. § 2283 14
Ch. 29, §§ 61, 62, Illinois Revised Statutes 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-14853.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Petitioner,

vs.

KENNY CONSTRUCTION COMPANY, A CORPORATION, S. A. HEALY COMPANY, A CORPORATION, AND JAMES McHUGH CONSTRUCTION COMPANY, A CORPORATION, d/b/a KENNY-HEALY-McHUGH, A JOINT VENTURE, AND ROYAL INDEMNITY COMPANY, A CORPORATION,
Respondents.

ANSWER OF ROYAL INDEMNITY COMPANY TO PETITION FOR WRIT OF CERTIORARI.

QUESTIONS PRESENTED FOR REVIEW.

Whether objections to the judgment of the District Court can be raised for the first time on Petition for Writ of Certiorari;

Whether injunctions issued as an incident of a declaratory judgment, and for the obvious purpose of delineating the *res judicata* effect of the declaratory judgment, violates principles of comity and federalism or are in the nature of injunctions needed to protect or effectuate the declaratory judgment within the meaning of 28 U. S. C. Section 2283;

Whether the District Court and Court of Appeals correctly concluded that under the law of Illinois the City may not claim indemnity for damages caused by City forces in the performance of work specifically reserved to the City and excluded from the contract containing the indemnity agreement.

STATEMENT OF THE CASE.

This declaratory judgment action was commenced in the Northern District of Illinois by Royal Indemnity Company (Royal) for resolution of coverage questions and determinations of Royal's rights and responsibilities under a policy of liability insurance as they related to several property damage cases pending in the Circuit Court of Cook County, Illinois. The named insured under Royal's policy was Kenny Construction Company, S. A. Healy Company and James McHugh Construction Company, d/b/a Kenny-Healy-McHugh, a joint venture (the Venture); by endorsement, the City of Chicago (City) was made an additional insured for liability arising out of a contract awarded by the City to the Venture whereunder the Venture undertook to perform a portion of the work involved in extending the Kennedy Rapid Transit System.

Royal's declaratory judgment action was brought under 28 U. S. C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure. Federal jurisdiction was invoked on the basis of diversity of citizenship. In addition to the City and the Venture, the plaintiffs in the state court lawsuits were made parties defendant to the declaratory judgment action, and were served with summons.

The City crossclaimed against the Venture, seeking a declaration that it was entitled to indemnity against the underlying state court suits by virtue of an indemnity provision in the contract under which the Venture performed a portion of the Rapid Transit extension project.

The City also filed a counterclaim against Royal, seeking a declaration that Royal was obligated under the insurance policy to defend and indemnify the City in the state court suits.

Royal's Complaint for Declaratory Judgment, as finally amended, was in six counts, alleging the existence of various

coverage questions and breaches of policy conditions that affected Royal's duty to defend and indemnify the Venture and City in the state court litigation (Royal was defending the Venture in the state court suits under a reservation of rights; no tender of the defense of the City, as an additional insured under the Royal policy, was made by the City until the City filed its counterclaim in this declaratory judgment action).

The District Court, after a non jury trial, entered judgment, the gist of which was that the City was not entitled to be indemnified by the Venture against the property damage suits being pressed in the state court, and that Royal had no duty under the policy to defend or indemnify the City against those claims. Judgment was entered against Royal on the other asserted grounds for declaratory relief.

The City appealed from the judgments of the District Court that the damages for which the City was being sued in the state court actions did not "accrue against the City in consequence of" the granting of the contract to the Venture" or "in anywise result therefrom," and that Royal's policy did not cover the City's potential liability to the property damage claimants since the City's liability did not arise out of "work being done by" the Venture for the City "under the project." Royal cross-appealed from an award of attorneys fees in favor of the Venture. The Venture cross-appealed from denial of additional attorneys fees claimed in the District Court.

The Court of Appeals for the Seventh Circuit affirmed the basic judgment of the District Court that the City was neither entitled to indemnity from the Venture under the provisions of the contract let by the City to the Venture nor to coverage under Royal's policy. The Court of Appeals also reversed the award of attorneys fees to the Venture against Royal, but that portion of the judgment by the Seventh Circuit is not involved in the City's Petition. The opinion of the Court of Appeals is reported at 528 F. 2d 184.

The trial before the District Court was lengthy and the record on appeal is voluminous, but, for the immediate purpose of setting forth the basic facts, they may be summarized as follows:

In January, 1968, the City advertised for bids on a public works project involving the construction of an extension to the Kennedy Rapid Transit system. The entire extension project, which totaled five miles (T. 1480) is referred to as "Project Ill UTG-2"; the particular portion of the project involved in this cause, *i.e.*, the construction of a subway structure from Logan Boulevard to Woodard Street, is referred to as "Contract K-4" (five other "K" contracts were let by the City). The work to be performed under Contract K-4 was "generally described" by the City as follows (Exhibit 14, Page A-1):

> "The work to be performed under this contract consists of the furnishing of all labor, materials, plant, equipment, and incidental and performing all operations necessary to construct approximately 2,560 lineal feet of subway and all appurtenant and collateral work in accordance with the Contract Documents. The work will be constructed open cut."

The Venture bid on Contract K-4 and on March 21, 1968, was awarded the contract by the City. The City's statement on page 5 of its Petition that the contract was granted on June 23, 1967, is inaccurate. Among the General Conditions contained in the K-4 contract was the following indemnity provision (Exhibit 14, Page 4):

> "INDEMNITY
>
> Contractor shall indemnify, keep and save harmless the City, its agents, officials and employees, against all injuries, deaths, loss, damages, claims, patent claims, suits, liabilities, judgments, costs and expenses, which may in anywise accrue against the City in consequence of the granting of this contract or which may in anywise result therefrom, whether or not it shall be alleged or determined that the act was caused through negligence or omission of the Contractor of his employees, of the subcontractor or his employees, if any, or of the City of Chicago or its employees, and the Contractor shall, at his own expense, appear, defend and

> pay all charges of attorneys and all costs and other expenses arising therefrom or incurred in connection therewith, and, if any judgment shall be rendered against the City in any such action the contractor shall, at his own expense, satisfy and discharge the same. Contractor expressly understands and agrees that any performance bond or insurance protection required by this contract, or otherwise provided by Contractor, shall in no way limit the responsibility to indemnify, keep and save harmless and defend the City as herein provided."

Royal issued a general liability policy with an effective date of March 18, 1968, naming the Venture as the named insured (Exhibit 1, Endorsement 15) and the City as an additional insured (Endorsement 2). Policy Endorsement 3 provides:

> "It is agreed that coverage hereunder is limited to work being done by the named insured for the City of Chicago under the project known as Project Ill-UTG-2 Contract K-4, Kennedy Rapid Transit Project, Logan Blvd, and Milwaukee Avenue."

Before the Venture started any construction work, the City undertook to relocate sewer and water lines from the center of Milwaukee Avenue and place them under the sidewalk on the east side of Milwaukee Avenue (T. 1305). Relocation of the sewer lines by the City involved tearing up the existing sidewalk and digging a trench 5 or 6 feet across (T. 1456) and 10-12 feet deep, laying the new sewer line, backfilling the trench with sand, then reopening the excavation a week or so later to a depth of 5 or 6 feet to lay the waterline (T. 1767, 1316-1320, 1585), again backfilling with sand and installing a temporary asphalt sidewalk. In those places where only the water lines were relocated, there was only one excavation to the 5-6 foot depth.

The Water Department and the Sewer Department each drew its own plans for this work and only City employees were engaged in the work (Dep. Goldberg 10/5/72, p. 46; T. 1407).

The Venture had set up a field office at the job site of K-4 on March 22, 1968, but no actual construction work was done

BLEED THROUGH

in the vicinity until after the City Sewer Department and the City Water Department had finished their work (T. 728).

Prior to the time the Venture commenced any construction work in the vicinity, damage was noted to buildings in the 2600 and 2700 block of Milwaukee Avenue. Of particular concern was damage to the building at 2747-2765 Milwaukee, a forty-year old, three-story structure which fronted on the east side of Milwaukee Avenue for a distance of about 100 feet, and is frequently referred to in the testimony as the Lanski Building. On or about May 7, 1968, in the course of trenching by the City of the sewer and water lines in front of the Lanski Building, there had been a cave in, exposing the foundation of the building and collapsing the earth from underneath the four-foot foundation (T. 1585, 1591, 730, 797-803).

On May 11, 1968, Dr. Joseph Moles, an optometrist who maintained offices at 2747½ Milwaukee Avenue, as he was told to do by Alfred Fosco, supervising engineer for the entire project (T. 1513), wrote the following letter to David Goldberg, Chief Engineer of the City Sewer Department (Pl.'s Ex. 60):

> "This is to report that on May 7, when the city sewer department was excavating in front of my office at 2747½ Milwaukee Avenue a considerable amount of damage was done to my office.
>
> The plate glass window (the return window) was broken in two places. The front plate glass window was pulled away from its frame, and the frame is now buckled. The plate glass window (the return window mentioned above) is lettered in gold leaf, so when you replace it the window will have to be re-lettered in gold leaf. The plaster on the inside of my office is now badly cracked from ceiling to floor, which happened at this time also, and which was called to the attention of some of your workmen on May 7. Also, in my laboratory there is now a gap of about 1" which was pulled loose between the floor and the footing, which occurred on May 7. I have been instructed to report these damages to you for at-

tention, and ask that you please let me hear from you as soon as possible as to when these damages will be taken care of."

A carbon copy of Dr. Moles' letter was sent to the Bureau of Engineers, whose Harry F. Zalewski, the Chief Engineer, advised Mr. Goldberg, Chief Engineer for the City Sewer Department that "we (the Bureau of Engineering) will not handle damages claims resulting from Bureau of Sewers' work." Nevertheless, Fosco did visit Dr. Moles' office and reported to Zalewski (Pl.'s Ex. 61, T. 1520):

"This is a legitimate complaint. In fact, more damage to his plate glass windows have occurred as of this date, and after his letter was written. Before any work was started in this area, settlement marks were put on all buildings. Later the City Sewer Department came in and laid a 12-inch ductile iron sewer along this building in the sidewalk area, at a depth of between 10 to 12 feet, about 70 lineal feet. As of June 12, our last settlement readings, we find that this building at the above address has dropped one and a quarter inches since the sewer was put in. When the Sewer Department was digging along this building, I saw that the foundation was very poor. I did not see any spread footing. As I recall, the foundation was about two feet deep. The Sewer Department put in some braces where possible. It seems that they did not help too much. In my opinion, something should be done to this building. I believe that Dr. Moles was told to send in an estimate of cost for repairs by the Sewer Department. He is not the owner of the building. . . "

News of complaints of damage from the City's work first reached the Venture in the form of a letter dated June 14, 1968, from a subcontractor. On June 26, the Venture wrote to the City:

"We wish to call your attention to a very serious and hazardous condition that exists on the above-captioned contract.

Excavation performed by the City of Chicago, Dept. of Water & Sewers, in installing temporary sewers along

the building line on both sides of Milwaukee Avenue has seriously endangered several of the adjacent structures. This excavation was performed in advance of any construction work by us.

We call your particular attention to the building at 2747 North Milwaukee Ave. Extreme and damaging settlement has occurred in this structure and, in our opinion it is still in an unstable condition, the nature and extent of which makes it unsafe for occupancy. Serious structural damage has occurred and, in our judgment, this building should be underpinned before any work is performed on our part in its vicinity. This is a matter that should have your immediate and prompt attention, since we are preparing to begin augering for the placement of soldier piles in this area within next two days, and any delays incurred by our forces will, because of circumstances beyond our control, increase the time required for us to complete our work.

We wish to inform you that we will accept no responsibility for any damage caused to existing structures by the work performed by the forces of the City of Chicago. We urge you to immediately investigate this matter so that proper lines of responsibility can be established so that our work can proceed in an uninterrupted manner."

The Bureau of Engineering of the City Department of Public Works responded on July 5:

"We acknowledge receipt of your letter of June 26, 1968 regarding the condition of a building at 2747 N. Milwaukee Ave.

Please proceed with your work in accordance with contract provisions. In particular, we direct your attention to Section III (page ASC-8), 'Care of Existing Structures and property and Contractor's Liability.' "

A copy of the June 26 letter from the Venture to the City was sent to Royal, and an adjuster was dispatched to the job site "to establish previous damage to a specific building prior to . . . joint venture." He reported back that "damage will continue till (sic) problem remedied while insured is present on site and even if they cause no further damage."

Within a few days of the writing of the June 26 letter to the City, the Venture commenced the subway construction, starting with putting "soldier piles" in place by augering holes into which the piles (basically I-beams) were inserted and then filling in the holes with cement (T. 1796). Actual excavation for the subway commenced in August. The Venture did its work in conformity with the plans and specifications set forth in the City's Contract K-4. Sheeting was used between the soldier piles and the cut was shored and braced. Periodic checks were made to affirm that the piles remained vertical and the vertical integrity of the subway excavation walls was maintained throughout (T. 1526-1530, 1565-1567, 1583). Nevertheless, the Lanski Building continued to sink, so that by February 11, 1969, the settlement had reached six inches, presenting a peril to the occupants.

Suits against the City and the Venture were instituted by adjoining property owners in the Circuit Court of Cook County; those suits are described in the 17th finding of fact by the District Court (City's Petition, pages 8a-10a). Royal undertook the defense of the Venture under a reservation of rights, then filed this declaratory judgment action in February, 1970, seeking resolution of coverage issues that had arisen.

The declaratory judgment suit was tried as a non jury matter from March 12 to March 29, 1974. At the conclusion of the trial, the District Court entered findings of fact, conclusions of law and final judgment as contained in the Appendix to the City's Petition. Appeals were taken by the City, the Venture and Royal from various portions of the judgment of the District Court; so far as is relevant to the City's Petition, the Court of Appeals for the Seventh Circuit affirmed the judgment that the City was not entitled to indemnity from the Venture or coverage by Royal.

BLEED THROUGH

ARGUMENT.

I.

THE CITY'S COMITY ARGUMENT DOES NOT WARRANT SUPREME COURT REVIEW.

A. The Issue Was Not Raised by the City in Either the District Court or the Court of Appeals.

The City argues that the judgment order entered by the District Court violates the principle of comity codified by Section 2283 of 28 U. S. C. and recently at issue in *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975). This issue has never before been raised, in the District Court or in the Court of Appeals, and its interjection at this stage is grossly violative of the rule that the Supreme Court will not consider matters that a party fails to present in the lower courts, *Cardinal* v. *Louisiana*, 394 U. S. 437 (1969).

Apparently anticipating this obvious objection, the City, referring to *Huffman* v. *Pursue, Ltd.*, states at page 22 of its Petition:

> "Although the abstention principle of *Younger* v. *Harris* had not been raised in the District Court, this Court reversed the judgment of the District Court solely on abstention grounds and remanded the case to the District Court for proceedings in accordance with that principle."

Huffman v. *Pursue, Ltd.* arose on direct appeal from a three-judge District Court which had enjoined execution of a portion of an order entered under an Ohio nuisance statute. Rather than appealing the judgment entered by the Ohio trial court, the appellants filed suit in the District Court seeking the injunction, which was granted on the ground that the nuisance statute violated the First Amendment. The principles of comity and

federalism underlying the rule of *Younger* v. *Harris*, 401 U. S. 37 (1971)—that Federal Courts will not normally enjoin pending proceedings under a State criminal law—were held, in *Huffman*, to be applicable to a civil proceeding "which in important respects is more akin to a criminal prosecution than are most civil cases," 420 U. S. 592 at 604. The decision in *Huffman* was to remand the case of the District Court for consideration of whether exceptions to the *Younger* principles might exist which would warrant continued Federal jurisdiction inasmuch as

> . . . The judgment and opinion of the District Court give no indication that it considered whether it should have stayed its hand in deference to the principles of federalism which find expression in *Younger* v. *Harris*.
>
> 420 U. S. 592 at 599

The quoted observation concerning the unreported decision of the District Court in *Huffman* may support the City's claim that "the abstention principle of *Younger* v. *Harris* had not been raised in the District Court," but, it is submitted, cannot fairly be said to amount to a general pronouncement that alleged comity issues are an exception to the normal rule that issues not raised in the District Court are not preserved for review. *Huffman* suit was brought specifically to enjoin enforcement of a State statute, thus a threshold issue of Federal abstention was both obvious and inherent. The situation presented in this case is not analogous: absent is any consideration, upon which the *Younger* and *Huffman* decisions partly depend, that a court of equity will not normally interfere with criminal prosecutions; prior to the filing of this declaratory judgment action there was no litigation anywhere to which Royal was a party or which would serve to resolve the coverage issues that had arisen; the bringing of the declaratory judgment as proceedings to resolve coverage questions in advance of judgment involving the claimant and insured in the underlying suit has long been endorsed as both appropriate and desirable, *Sears, Roebuck*

BLEED THROUGH

and Company v. *Zurich Insurance Company*, 422 F. 2d 587 (7th Cir. 1970); none of the parties to this case ever questioned the jurisdiction or authority of the District Court to act or to fully resolve the questions presented—to the contrary, the City, by filing its crossclaim against the Venture for indemnity under the contract and its counterclaim seeking a declaration that it was entitled to coverage under Royal's policy, clearly enlisted the offices of the District Court and became bound by the Court's resolution of those issues.

The judgments against the City followed a full, lengthy and difficult trial and appellate review on the merits of the various claims asserted by the parties against each other; at this late date the City should not be heard to urge that those judgments should be upset on the basis of an afterthought claim dredged out of the record to gain a foothold for further appellate review.

B. The Injunctions Entered by the District Court Were Proper in that They "Protected and Effectuated" the Declaratory Judgment.

Neither Royal nor any of the other parties sought enjoinment of any phase of the State Court litigation; Royal sought a declaration that its policy defenses were well-founded, the City sought a declaration that it was entitled to be indemnified by the Venture and covered as an additional insured under Royal's policy. Since resolution of the claims between Royal, the Venture and the City gave rise to the issue of whether the property damages being alleged in the State Court suits accrued "in consequence of" or "in anywise" resulted from the granting of the K-4 contract to the Venture, it became necessary to inquire into the factual detail of the State Court suits.

While much of the evidence pertained to claims arising out of damage to the Lanski building, claims arising out of damage to other buildings were also considered.

After hearing the evidence, the District Court concluded that the City and the Venture were being sued because of damage

caused solely by the City in the course of work withheld by the City from the scope of the K-4 contract and prior to commencement of actual work by the Venture. Having made such a finding as to some aspects of the claims which were also at issue between the state court litigation—*i.e.*, the claims between the City and the Venture as to which, if either, was liable to the property damage claimants, and whether the claims for indemnity being asserted by the City against the Venture in the State Court were well-founded—became *res judicata*. The injunctions were nothing more than expressions of the *res judicata* effect intended by the declaratory judgment. As a practical matter, the injunctions obviated the need for having to plead the declaratory judgment as affirmative defenses in the State Court actions, and the possible need for the State Court judges to wade through the findings of fact, conclusions of law and declaratory judgment to determine what had been decided in the District Court.

28 U. S. C., Section 2283 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The exception contained in Section 2283 for injunctions "to protect or effectuate" a federal judgment gives the District Court a right to "enjoin a state proceeding which is precluded under the doctrine of *res judicata*," *Woods Exploration & Producing Company* v. *Aluminum Company of America*, 438 F. 2d 1286 at 1312 (5th Cir. 1971), followed in *Donelon* v. *New Orleans Terminal Company*, 474 F. 2d 1108 (5th Cir. 1973), wherein Judge Goldberg observed (at page 1114):

> . . . While Section 2283 was designed to ensure the state courts' adjudicative potency, its exceptions assure that the federal courts and their judgments will not be eunuchized and that their muscularity will not be atrophied.

To the same effect is *Southwest Airlines Co.* v. *Texas International Airlines*, 396 F. Supp. 678 at 684 (N. D. Tex. 1975).

BLEED THROUGH

Prior to the entry of judgment in this case, issues of responsibility to the property owners and the City's claim to indemnity against the Venture were at issue both in the District Court and the State Court. The indemnity issue was raised in the District Court when the City elected to file its crossclaim against the Venture. Had one of the State Court actions proceeded to judgment on the merits, the District Court would have to give *res judicata* effect to that judgment. As it happened, the District Court was the first to reach a judgment, and there is nothing in the concept of comity or Section 2283 that prevents the District Court from spelling out the effect of its judgment.

II.

THE DECISIONS OF THE DISTRICT COURT AND COURT OF APPEALS WERE CORRECT AS A MATTER OF ILLINOIS LAW.

In *Westinghouse Electric Elevator Co.* v. *LaSalle Monroe Building Corp.*, 395 Ill. 429 at 433 (1947), the Illinois Supreme Court stated:

> ". . . an indemnifying contract will not be construed, as indemnifying one against his own negligence, unless such a construction is required by clear and explicit language of the contract . . . or such intention is expressed in unequivocal terms."

Dozens of Illinois Appellate and Federal diversity cases have been decided in the nearly thirty years that have passed since the *Westinghouse* decision, and there developed a distinct trend toward expanding the effective scope of indemnity agreements. The erosion of the conservative approach of *Westinghouse* continued despite the decision of the Illinois Supreme Court in *Li Petri* v. *Turner Construction Co.*, 36 Ill. 2d 597 (1967), wherein a general contractor asserted a claim for indemnity against an electrical subcontractor which had a contract to install an electrical system in a building under construction

providing that the electrical contractor assumed "entire responsibility and liability" for damage "growing out of or resulting from the execution of the work provided for in this Contract or occurring in connection therewith." The general contractor argued that when the electrical contractor received a change order to include maintenance as well as installation, the electrical contractor assumed the obligation to indemnify the general contractor with respect to maintenance. The Court, in rejecting this argument, stated (36 Ill. 2d at 611):

> "On the basis of the record before us, we conclude that the occurrence *did not grow out of, result from or occur in connection with any work of Fishbach provided for in the subcontract containing the indemnification clause.* Although the accident may have arisen in part from work performed by Fishbach on the material host, this work was not provided for in the subcontract . . ."

The trend toward liberal endorsement of indemnity agreements as a matter of "good business" was halted in *Tatar* v. *Maxon Construction Co.*, 54 Ill. 2d 64 (1973) wherein the Court held broad indemnity agreement insufficient to entitle one to claim indemnity for his own negligence, stated that each contract must stand on its own language, fairly and reasonably interpreted in light of all of its language and provisions, and that indemnity agreements are to be "measured against the standards set forth in *Westinghouse.*"

Tatar was followed by *Zadak* v. *Cannon,* 59 Ill. 2d 118 (1974), which again held an indemnity agreement insufficient to require the indemnitor to answer for the indemnitee's own default; clearly, the agreements construed in *Tatar* and *Zadak* would have been sufficient to impose indemnity had cases such as *De Tienne* v. *S. N. Nielsen Co.*, 45 Ill. App. 2d 231 (1963) or *White* v. *Morris Handler Co., Inc.*, 7 Ill. App. 3d 199 (1972), relied on by the City, been followed.

The City states (Petition, page 26) that the 1973 Illinois Statute declaring void as against public policy agreements in

BLEED THROUGH

construction contracts which purport to indemnify one against his own negligence has no application since contract K-4 was entered into prior to 1973. However, the Appellate Court opinion in *Tatar* v. *Maxon Construction Co.*, 3 Ill. App. 3d 351 (1973) did give weight to the Legislature's expression of public policy, and in upholding the constitutionality of the statute, the Illinois Supreme Court, in *Davis* v. *Commonwealth Edison Co.*, 61 Ill. 2d 494 (1975) expressed views that warrant consideration in identifying the weight of Illinois law, particularly with respect to the diminishment of the prophylactic effect of tort liability caused by indemnity agreements.

But even in the "liberal" period post-*Westinghouse* and pre-*Tatar*, no Illinois Court has ever held that an indemnity agreement would encompass work that was not part of the contract let to the indemnitor. A few examples of decisions, in addition to *Li Petri* v. *Turner Construction Co.*, 36 Ill. 2d 597 (1967), mentioned above, which hold that indemnity agreements only cover work included in the contract containing the agreement, are: *McInerney* v. *Hasbrook Construction Company*, 16 Ill. App. 3d 464 (1974) (general contractor not entitled to indemnity from painting subcontractor where indemnity agreement was contained in a contract referring the "Models number 2500, 2600, 2800 and 2900" and original plaintiff was working on a "Model 3600" at the time of the injury; invoices offered to show the painting agreement has been expanded by usage to include the "Model 3600" properly excluded); *Wilson* v. *Illinois Bell Telephone Company*, 19 Ill. App. 3d 47 (1974) (owner not entitled to indemnity from contractor which had undertaken to build a platform to protect switching equipment while engaged in removing ceilings at owner's plant; employee of another contractor fell on the platform; injured employee's work not connected with the job that was the subject of the contract containing the indemnity agreement); *Collins* v. *Montgomery Ward & Co.*, 21 Ill. App. 3d 1037 (1974) (plaintiff entered into contract to install aluminum siding on Ward's

building; contract, dated April 16, contained indemnity agreement; on April 21, plaintiff purchased ladder from Wards and while using this ladder fell; *held:* it would be an "undue extension" of the indemnity agreement to allow it to be used by Ward in defense of the plaintiff's strict liability suit against Ward); and *Knickerbocker Roofing* v. *Mendius Associates,* 95 Ill. App. 2d 96 (1958): Knickerbocker as contractor to the Federal Government to perform work on the main Post Office Building in Chicago, gave a subcontract to Mendius to furnish labor and materials with reference to installation of certain insulated roofing materials; the subcontract provided:

> "The Subcontractor does hereby agree to indemnify and save harmless the Contractor, its employees and agents, and the Government, from all loss, damage, costs and expenses which any of them may suffer or sustain or be threatened with liability for arising, either under the laws of the State of Illinois or of the United States of America, or otherwise, out of performance of this contract by the Subcontractor, its agents, employees or materialmen."

Prior to execution of the written contract, an oral agreement had been made whereby for a fee Mendius would use its hoist to lift Knickerbocker's materials to the roof of the post office.

Two Mendius employees were injured while hoisting both a roofing substance as part of the written contract and, simultaneously two cans of gasoline which the trial court found to have been within the oral contract. The employees brought suit action seeking a declaration that it was entitled to indemnity.

In affirming a judgment in favor of Mendius, the Court concluded that the threatened losses to Knickerbocker arose out of the performance of the oral contract, which contained no indemnity provision, and that the indemnity provision was not intended to apply to the activities outlined in the oral agreement. In distinguishing three of the decisions relied on by the City in this case, the Court stated (95 Ill. App. 96 at 103):

BLEED THROUGH

> "Likewise, in the cases of *De Tienne* v. *S. N. Nielsen Co.*, 45 Ill.App.2d 231, 195 N.E.2d; 240; *Newberg Const. Co.* v. *Fischbach, Moore & Morrissey, Inc.*, 46 Ill.App.2d 238, 196 N.E.2d 513; and *Northern States Co., Inc.* v. *A. Finkl & Sons Co.*, 8 Ill.App.2d 419, 132 N.E.2d 59, cited by Knickerbocker, the respective courts were presented with situations wherein the indemnity provisions in question were contained within the only contracts applicable to the incidents out of which losses (actual or threatened) to the indemnitees arose. In other words, unlike the case at bar, these cases cited by Knickerbocker did not contain separate contracts providing for duties not enumerated in the contracts containing the indemnity provisions."

The District Court found (Finding of Fact 16, City's Petition, page 72):

> 16. As the court said in its oral statement at the conclusion of the trial, the work of the joint venture did not cause the damage to the buildings along Milwaukee Avenue and if the joint venture had done no work at all, the same damage would have occurred.

The Court of Appeals correctly noted that "the City's relocation work was activity *specifically withheld* from the K-4 contract." (City's Petition, page 26a.)

Given the accuracy of these two propositions, neither of which the City can seriously controvert on the basis of the record in this case, it is submitted that the only "fair and reasonable interpretation," as that expression is used in *Tatar* v. *Maxon Construction Co.*, 54 Ill. 2d 64 (1973) is that the City is being sued for damages caused by the City's own forces prior to the commencement of any work by the Venture under the K-4 contract, and not for any liabilities that in anywise accrued in consequence of or in anywise resulted from the granting of the K-4 contract.

CONCLUSION.

The claims by the City that principles of comity were infringed by the judgment of the District Court is neither timely nor substantial, and the results reached in the District Court and Court of Appeals are both supported by the record and the law of Illinois.

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

HENRY J. MARQUARD,
39 South LaSalle Street,
Chicago, Illinois 60603,
312-782-5225,
Attorney for Respondent Royal Indemnity Company.